

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>GARY W. MITCHELL</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 193,437
<b>BEECH AIRCRAFT CORPORATION</b>	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Respondent appeals from an Award entered by Administrative Law Judge (ALJ) Nelsonna Potts Barnes on March 5, 1997.

**APPEARANCES**

Claimant appeared by his attorney, David H. Farris of Wichita, Kansas. Respondent appeared by its attorney, Terry J. Torline of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Chris S. Cole of Wichita, Kansas.

**RECORD AND STIPULATIONS**

The Appeals Board has reviewed and considered the record listed in the Award. The Appeals Board has also adopted the stipulations listed in the Award.

**ISSUES**

The three issues on appeal are:

(1) Nature and Extent of Disability. The ALJ awarded an 87.75 percent work disability. On appeal respondent contends claimant should be limited to functional impairment because respondent offered claimant employment at a comparable wage. The offered employment was a deburr job and the central dispute is whether the job was within claimant's restrictions

(2) Date of Accident. The ALJ concluded claimant's back injury resulted from repetitive trauma through the last date worked, August 3, 1994. Respondent contends the date of accident should be January 14, 1994, when a back brace was prescribed for claimant. According to respondent, there was no evidence of aggravation or worsening after that date.

(3) Liability of the Kansas Workers Compensation Fund. Respondent contends the Kansas Workers Compensation Fund should be liable for all the benefits awarded in this case.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record and considering the arguments, the Appeals Board concludes the Award should be affirmed as to the date of accident (finding a date of accident of August 3, 1994) and Fund liability (finding no Fund liability) but the finding on nature and extent of disability should be modified to an award based on functional impairment of 15 percent to the body as a whole.

#### **Findings of Fact**

(1) Claimant injured his low back during the period January 1994 through August 3, 1994, as a result of work activities he performed for respondent.

(2) Claimant had an earlier back injury for which he was treated by Dr. VanGallera. Dr. VanGallera released claimant to return to work in January 1993 without a rating and without restrictions.

(3) During the period of injury involved in this case, January 1994 through August 3, 1994, claimant worked for respondent as a hydropress operator, a job which he testified required repetitive bending, stooping, twisting, turning, lifting, and carrying. He also lifted various dies weighing up to 75 pounds.

(4) In January 1994 and again in July 1994, claimant went to his family physician, Steve Lemons, M.D., with complaints of back pain. Claimant saw Dr. Lemons several times between January and July of 1994 for other problems and did not mention his back. Dr. Lemons testified, however, he believed the back condition was gradually worsening during that period through and including claimant's last day worked. In July 1994, when the back pain worsened, Dr. Lemons referred claimant to Dr. Stephen Ozanne.

(5) Dr. Ozanne began treating claimant on August 17, 1994. Dr. Ozanne's impression was that of a "degenerative disk with segmental instability at L5-S1 and a situation of chronic lumbar strain."

Dr. Ozanne also immediately recommended the following restrictions:

- a. 0-35 pound occasional lift
- b. 0-20 pound frequent lift
- c. Is to have a work station at a suitable height so that he can work with minimal bending in terms of position
- d. In the terms of frequency of bending, twisting, and turning, this should be on a limited basis defined as less than one-third of an 8-hour working day spread out throughout the day

Dr. Ozanne later indicated those were permanent restrictions. Dr. Ozanne rated claimant's functional impairment as 7 percent of the whole body and testified that 50 percent of the impairment preexisted the injury involved in this claim.

(6) Claimant was off work and was paid temporary total disability benefits from August 3, 1994, until he was released by Dr. Ozanne on November 11, 1994. Claimant remained off work and received unemployment compensation from November 11, 1994, to January 16, 1995, when respondent returned claimant to work in a deburr job.

(7) After the injury to his back, claimant was unable to return to his job as a hydropress operator, the position he held during the period of the injury.

(8) On January 16, 1995, claimant attempted work for respondent at a deburr job for only approximately two hours. When claimant complained of pain from the work, he was given an opportunity to rest. But claimant indicated the pain did not subside and he went home. A representative of respondent then called claimant at home and advised him he was being placed on medical leave.

(9) Claimant also suffers from muscular dystrophy and was treated for this condition by Jane K. Drazek, M.D., and Dr. Abbas. On January 26, 1995, shortly after the unsuccessful attempt to perform the deburr job, Dr. Drazek recommended that claimant be restricted to lifting 5 pounds frequently and 10 pounds occasionally. Dr. Drazek also recommended claimant be limited to working four hours per day. These restrictions were intended to take into consideration both the back injury and the muscular dystrophy. The previously mentioned restrictions by Dr. Ozanne were, on the other hand, for the back injury only. The restriction by Dr. Drazek against working more than four hours per day was imposed because claimant had not been working for some time and Dr. Drazek felt claimant should resume work on a part-time, no more than four hours per day, basis and work up to full time. This restriction was intended to be temporary.

(10) Each month, for approximately one year after being placed on medical leave, claimant obtained and submitted to respondent a statement from Dr. Ozanne describing claimant's restrictions. Claimant was told respondent had no positions within his restrictions. In January of 1996, respondent terminated claimant based on the fact he had been on medical leave for one year.

(11) Dr. Schlachter examined claimant on December 21, 1994, at the request of claimant's counsel. He diagnosed disc disease of the lumbar spine with chronic lumbosacral sprain. He rated the functional impairment as 30 percent of the body as a whole and that 5 percent impairment to the body as a whole preexisted the current injuries. He recommended claimant be restricted from lifting more than 5 pounds repetitively and 10 pounds on a single lift, with no bending more than six times in an hour. He recommended that claimant have a job where he could sit part-time and stand part-time. He also concluded claimant was likely not capable of working more than four hours out of an eight-hour day. The restriction against working more than four hours per day was because of the muscular dystrophy while the other restrictions were for the back injury.

(12) The deburr job claimant attempted in, January 1995, involved using a small air-powered sander to sand burrs off of drill holes in parts. The parties disagree about the extent to which the job required claimant to bend and whether the job requirements were within the medical restrictions.

Claimant testified he had to bend more than six times per hour to put parts in a tub. Respondent, on the other hand, presented testimony that the tub could have been put up on the table. Claimant testified he was required to use a stool with no back and that this caused some of the discomfort. Respondent presented evidence that it could and would have provided a seat with a back if it had known.

(13) The Appeals Board concludes claimant did not make a good faith effort to perform the duties of the deburr job. This conclusion is reached on the basis of the opinion of Dr. Drazek, given after she viewed a videotape of the job, the testimony of Dr. Ozanne regarding restrictions, and the Board's review of the videotape. It is the Board's opinion that the job did not violate the restrictions recommended by either Dr. Drazek, Dr. Ozanne or Dr. Schlachter. The primary issue in dispute is the extent to which the job required claimant to bend. The Board has concluded the job did not require bending in excess of the limits recommended by these physicians. The Board is also persuaded, in part, by the fact claimant did not communicate to respondent any of the problems he now claims he had with the deburr job.

(15) The wage in the deburr job would have been more than 90 percent of the wage claimant earned at the time of the injury.

(16) The Appeals Board finds claimant's functional impairment to be 20 percent with 5 percent of this disability preexisting the current injuries. This conclusion is based on the opinions of Dr. Ozanne, who rated claimant's impairment at 7 percent and concluded 3.5 percent general body of the impairment preexisted, and Dr. Schlachter, who rated the impairment at 30 percent with 5 percent preexisting.

Conclusions of Law

(1) The Appeals Board finds that the date of accident was August 3, 1994, the last date claimant worked for respondent. Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994).

(2) K.S.A. 44-510e(a) sets out the statutory definition of permanent partial general disability and an injured employee's entitlement to the same:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

(3) K.S.A. 44-510e(a) also provides that an employee is not entitled to benefits in excess of the functional impairment so long as the employee earns a wage which is 90 percent or greater than his or her pre-injury wage.

(4) Because claimant did not make a good faith effort at the employment offered by respondent, the wage in that job should be imputed to claimant to determine the wage loss factor in the work disability formula. Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995); Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

(5) Since the wage in the offered employment was 90 percent or more of claimant's pre-injury wage, claimant is not entitled to benefits in excess of the functional impairment. K.S.A. 44-510e(a).

(6) K.S.A. 44-501(c) provides that any award must be reduced by the amount of functional impairment that preexisted the injury:

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

(6) Claimant is entitled to benefits for a 15 percent disability based on functional impairment. This conclusion is based on a finding that claimant has a 20 percent impairment but 5 percent preexisted the current injuries.

(7) Because claimant's accident occurred after July 1, 1994, the Kansas Workers Compensation Fund has no liability. K.S.A. 44-567.

**AWARD**

**WHEREFORE**, the Appeals Board finds that the Award entered by Administrative Law Judge Nelsonna Potts Barnes, dated March 5, 1997, should be, and is hereby, modified.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, Gary W. Mitchell, and against the respondent, Beech Aircraft Corporation, for an accidental injury which occurred August 3, 1994, and based upon an average weekly wage of \$608 for 14.71 weeks of temporary total disability compensation at the rate of \$319 per week or \$4,692.49, followed by 62.25 weeks at the rate of \$319 per week or \$19,857.75, for a 15% permanent partial general disability, making a total award of \$24,550.24, all of which is presently due and owing in one lump sum less amounts previously paid.

The Appeals Board also approves and adopts all other orders made in the Award by the Administrative Law Judge not inconsistent herewith.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 1998.

---

BOARD MEMBER

---

BOARD MEMBER

---

BOARD MEMBER

c: David H. Farris, Wichita, KS  
Terry J. Torline, Wichita, KS  
Chris S. Cole, Wichita, KS  
Nelsonna Potts Barnes, Administrative Law Judge  
Philip S. Harness, Director